

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

MICHAEL LAYTON,)	
)	
Plaintiff,)	
)	
v.)	
)	
E-DISTRIBUTIONS, INC.,)	
KENNETH R. ADAMS, individually)	
and in his capacity as an)	
agent of E-Distributions,)	
Inc., and Vice-President of)	
Imaging Technologies Services,)	
Inc.,)	No. 4:04 CV 1238 DDN
CARTER POPE, individually and)	
in his capacity as an agent)	
of E-Distributions, Inc. and)	
President of Imaging Technologies)	
Services, Inc., and IMAGING)	
TECHNOLOGIES SERVICES,)	
INC.,)	
)	
Defendants.)	

MEMORANDUM

This action is before the court on the motion of defendants E-Distributions, Inc. (wholly owned subsidiary of Imaging Technologies Services)¹, Imaging Technologies Services, Inc. (ITS), Carter Pope (President of ITS), and Kenneth Adams (Vice-President of ITS) to dismiss, or in the alternative to transfer venue. (Doc. 6.)

Plaintiff Michael Layton commenced this action in this court on the basis of 28 U.S.C. § 1332 (diversity of citizenship). (Doc. 1.) The parties² have consented to the exercise of plenary authority by the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(c).

¹E-Distributions was dissolved August 16, 2004, and is no longer a business entity. (Doc. 6, Ex. A1.)

²On March 11, 2005, District Judge E. Richard Webber dismissed without prejudice plaintiff's claims against defendant John Doe for failure to secure service of process as required by Federal Rule of Civil Procedure 4(m). All other parties have filed written consents to magistrate judge authority under 28 U.S.C. § 636(c).

In the instant four count complaint, Layton alleges four claims: Count I--breach of contract; Count II--fraudulent misrepresentation; Count III--conspiracy; and Count IV--tortious interference with a business relationship. (Id. at 6-11.)

More specifically, Layton alleges he was contacted by Adams, in September 1999, to become the Vice-President of E-Distributions. (Doc. 1 at 3 & Doc. 11 at 2.) Layton and Adams (on behalf of E-Distributions and ITS) signed an Executive Employment Agreement with Layton's employment to begin on October 1, 1999 and continue for a term of one year. (Doc. 1, Ex. A.) Layton further alleges that his employment with E-Distributions was to continue for successive one year terms, unless he received 30 days written notice, prior to the end of the current term. (Id. at 4.) Should E-Distributions exercise its option to not renew Layton's contract, he is entitled to certain compensation, as detailed in the employment agreement. (Id.) Pursuant to the agreement, Layton further alleges he is entitled to sales commissions and, should E-Distributions be sold or merged, Layton also is entitled to a percentage of the proceeds. (Id.)

Layton alleges that on October 18, 2000, he received written notice terminating his contract. (Id. at 5.) Layton alleges that, upon his request, defendants refused to pay his outstanding base salary and sales commissions. (Id.) Moreover, Layton alleges he was refused his portion of proceeds from the sale or merger of E-Distributions. (Id.)

Motion to Dismiss

Defendants have moved to dismiss arguing a lack of personal jurisdiction over the corporate entities and individual defendants. (Doc. 6.) Specifically, defendants contend they are all Georgia residents, they in no way committed acts enumerated under the Missouri Long Arm Statute (Mo. Rev. Stat. § 506.500), and they lack sufficient minimum contacts with Missouri in order for this court to assert personal jurisdiction satisfying due process.

Concurrent with the case at bar, defendant ITS, on behalf of itself and former subsidiary E-Distributions, filed a complaint against Layton in the United States District Court for the Northern District of

Georgia. (Doc. 11, Ex. 6.) ITS alleges misappropriation of corporate opportunities, tortious interference with business relations, usurping corporate opportunities, tortious interference with contract, misappropriation of corporate services and resources, and breach of contract. (Id. at 8-16.)

While it is true that the plaintiff bears the ultimate burden of proof on [the] issue [of jurisdiction], jurisdiction need not be proved by a preponderance of the evidence until trial or until the court holds an evidentiary hearing. Cutco Ind. v. Naughton, 806 F.2d 361, 365 (2d Cir.1986). To defeat a motion to dismiss for lack of personal jurisdiction, the nonmoving party need only make a prima facie showing of jurisdiction. Watlow Elec. Mfg. v. Patch Rubber Co., 838 F.2d 999, 1000 (8th Cir.1988); Falkirk Min. Co. v. Japan Steel Works, Ltd., 906 F.2d 369, 373 (8th Cir.1990). If the district court does not hold a hearing and instead relies on pleadings and affidavits, . . . the court must look at the facts in the light most favorable to the nonmoving party, Watlow Elec. Mfg., 838 F.2d at 1000, and resolve all factual conflicts in favor of that party. Nieman v. Rudolf Wolff & Co., Ltd., 619 F.2d 1189, 1190 (7th Cir.), cert. denied, 449 U.S. 920, 101 S.Ct. 319, 66 L. Ed.2d 148 (1980).

Dakota Indus., Inc. v. Dakota Sportswear, Inc., 946 F.2d 1384, 1387 (8th Cir. 1991); Lakin v. Prudential Secs., Inc., 348 F.3d 704, 706 (8th Cir. 2003) ("We review . . . whether appellants have presented a prima facie case of personal jurisdiction, viewing the evidence in the light most favorable to the appellants and resolving all factual conflicts in their favor."); Efco Corp. v. Aluma Sys USA, Inc., 983 F. Supp. 816, 819 (S.D. Iowa, 1997).

Missouri Long Arm Statute

"In a diversity action, a federal court may assume jurisdiction over nonresident defendants only to the extent permitted by the long-arm statute of the forum state, and by the due process clause of the Fourteenth Amendment." Burlington Indus., Inc. v. Maples Indus., Inc., 97 F.3d 1100, 1102 (8th Cir. 1996).

The Missouri long arm statute provides, in relevant part:

1. Any person or firm, whether or not a citizen or resident of this state, or any corporation, who in person or through an

agent does any of the acts enumerated in this section, thereby submits such person, firm, or corporation, and, if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any such acts:

- (1) The transaction of any business within this state;
- (2) The making of any contract within this state;
- (3) The commission of a tortious act within this state;

. . . .

3. Only causes of action arising from acts enumerated in this section may be asserted against a defendant in an action in which jurisdiction over him is based upon this section.

Mo. Rev. Stat. § 506.500 (2003).

The Missouri Supreme Court has declared that when the Missouri legislature enacted the long-arm statute, its "ultimate objective was to extend the jurisdiction of the courts of this state over nonresident defendants to that extent permissible under the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States." State v. Pinnell, 454 S.W.2d 889, 892 (Mo.1970) (en banc). Accordingly, Missouri courts have interpreted the statute broadly to cover those cases where the Due Process Clause permits the assertion of personal jurisdiction.

Clune v. Alimak AB, 233 F.3d 538, 541 (8th Cir. 2000); Fairbanks Morse Pump Corp. v. Abba Parts, Inc., 862 F.2d 717, 718-19 (8th Cir. 1988) ("Jurisdiction under the Missouri Long-Arm Act involves a two-part analysis. First, does the activity of the defendant fall within the ambit of the state statute and, second, does the assertion of jurisdiction violate federal due process?").

Minimum Contacts Under the Due Process Clause

The principles of personal jurisdiction under the Due Process Clause are well established. Jurisdiction is appropriate only where a defendant has sufficient "minimum contacts" with the forum state that are more than random, fortuitous, or attenuated, such that summoning the defendant would not offend traditional notions of fair play and

substantial justice. Digi-Tel, 89 F.3d at 522 (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475, 105 S.Ct. 2174, 85 L. Ed.2d 528 (1985); Int'l Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945); and Milliken v. Meyer, 311 U.S. 457, 463, 61 S.Ct. 339, 85 L.Ed. 278 (1940)). The central question is whether a defendant has purposefully availed itself of the privilege of conducting activities in the forum state and should, therefore, reasonably anticipate being haled into court there. Burger King, 471 U.S. at 475, 105 S.Ct. 2174; World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297, 100 S.Ct. 559, 62 L. Ed.2d 490 (1980). Minimum contacts must exist either at the time the cause of action arose, the time the suit is filed, or within a reasonable period of time immediately prior to the filing of the lawsuit. Clune v. Alimak AB, 233 F.3d 538, 544 n. 8 (8th Cir.2000).

With these principles in mind, [the court] look[s] at five distinct factors: (1) the nature and quality of the defendant's contacts with the forum state; (2) the quantity of contacts; (3) the relationship between the cause of action and the contacts; (4) the forum state's interest in providing a forum for its residents; and (5) the convenience of the parties. Digi-Tel, 89 F.3d at 522- 23. The first three factors are closely related and are of primary importance, while the last two factors are secondary. Id. at 523.

Pecoraro v. Sky Ranch for Boys, Inc., 340 F.3d 558, 561-62 (8th Cir. 2003); Burlington Indus., Inc. V. Maples Indus., Inc., 97 F.3d 1100, 1102 (8th Cir. 1996).

Kenneth R. Adams and Carter Pope

As the basis for jurisdiction over the individual defendants, Layton alleges that Adams contacted him in St. Louis for employment, Adams and Layton negotiated an employment agreement, which Adams forwarded to Layton in St. Louis, and Adams and Pope committed tortious acts in St. Louis, including fraudulent misrepresentation, conspiracy, and tortious interference with a business relationship.

In order to establish jurisdiction under the Long Arm Statute for the commission of a tortious act within the state of Missouri, the "plaintiff must make a prima facie showing that the tort has been committed." Inst. Food Mktg. Assoc., Ltd. v. Golden State Strawberries, Inc., 747 F.2d 448, 453 (8th Cir. 1984); Dotzler v. Perot, 899 F. Supp.

416, 422 (E.D. Mo. 1995) ("Plaintiffs must make a prima facie showing that the defendant has in fact committed the tort alleged in the complaint."); Hanline v. Sinclair Global Brokerage Corp., 652 F. Supp. 1457, 1459 (W.D. Mo. 1987); State ex rel. William Ranni v. Hartenbach, 742 S.W.2d 134, 139 (Mo. 1987) ("A party relying on a defendant's commission of a tort within this state to invoke long arm jurisdiction must make a prima facie showing of the validity of his claim."). Missouri courts have broadly interpreted the "within the state of Missouri" provision "to apply to extra-territorial acts that have consequences in the forum." Nelson v. R. Greenspan & Co., Inc., 613 F. Supp. 342, 345 (E.D. Mo. 1985); see also Vanliner Ins. Co. v. All Risk Serv., Ltd., 990 F.Supp. 1145, 1150 (E.D. Mo. 1997) ("Under Missouri law, commission of a tortious extraterritorial act having consequences in Missouri is sufficient to invoke tortious long-arm jurisdiction.").

While Layton attempts to allege the elements of the torts in question, he does not allege any facts, in either his complaint or supporting affidavit, sufficient to support his assertions that Adams and Pope engaged in fraudulent misrepresentation, conspiracy, or tortious interference with a business relationship. See Dotzler, 899 F. Supp. at 423 ("Though plaintiffs are not required to establish personal jurisdiction by a preponderance of the evidence at this stage of the proceeding, they must provide some evidence to support their allegations.").

Regarding the conspiracy count, plaintiff proffers no facts or circumstances to support a prima facie case of conspiracy between Adams and Pope, as the Vice-President and President (respectively) of ITS (and the now dissolved E-Distributions), and ITS as an entity. As a general rule, an organization cannot conspire with its employees. See Mika v. Cent. Bank of Kansas City, 112 S.W.3d 82, 94 (Mo. App. 2003). An exception to this general rule exists when employees have a truly independent stake in achieving the object of the conspiracy. Id. In this case, Layton proffers no facts to suggest any independent stake on the part of Adams and Pope.

With respect to the count for tortious interference with a business relationship, "there can be no liability for tortious interference with

a business expectancy against the individual defendant, . . . " absent "allegations in [Layton's] petition [or] evidence showing that [Adams and Pope] used improper means, acted in bad faith, acted out of self-interest, or acted outside the scope of his authority, such that he would be subjected to individual liability." Jurisprudence Wireless Communications, Inc. v. CyberTel Corp., 26 S.W.3d 300, 303 (Mo. App. 2000). Layton has produced no factual support sufficient to exhibit a prima facie case of tortious interference with a business relationship.

To make a claim for fraudulent misrepresentation, Layton must show 1) a false, material representation; 2) the speaker's knowledge of its falsity or his ignorance of its truth; 3) the speaker's intent that it should be acted upon by the hearer in the manner reasonably contemplated; 4) the hearer's ignorance of the falsity of the representation; 5) the hearer's reliance on its truth; 6) the hearer's right to rely thereon; and 7) the hearer's consequent and proximately caused damages.

Mprove v. KLT Telecomm., Inc., 135 S.W.3d 481, 489 (Mo. App. 2004). "In addition, all averments of fraud must state with particularity the circumstances--i.e., the facts--constituting the fraud." Heitman v. Brown Group, Inc., 638 S.W.2d 316, 319 (Mo. App. 1982). Neither the complaint nor the supporting affidavit provides a factual basis to support or infer that Adams or Pope intended to not honor the contract at the time the parties entered into the agreement.

Assuming, *arguendo*, that Layton sufficiently pleaded the commission of tortious acts to satisfy the Long Arm Statute, the exercise of personal jurisdiction over Adams and Pope does not comport with due process. The court must look closely at the nature and quality of the defendants' contacts with the forum state, the quantity of contacts, and the relationship between the cause of action and the contacts, with some consideration given to the forum state's interest in providing a forum for its residents, and the convenience of the parties. Pecoraro, 340 F.3d at 561-62.

Adams and Pope are Georgia citizens and residents, and have never resided in, or been citizens of, Missouri. There is no indication from the record that either Adams or Pope traveled to Saint Louis to do business, beyond Pope's visit to St. Louis in 1999 for the potential

purchase of a Missouri business (the purchase did not take place). Moreover, neither party owns any real estate or business in Missouri.

With respect to the employment agreement, neither defendant traveled to Missouri to negotiate the agreement; only a few telephone or facsimile communications occurred between the parties, each in his respective state of residence. Scullin Steel Co. V. Nat'l Ry. Utilization Corp., 676 F.2d 309, 314 (8th Cir. 1982) ("The use of interstate facilities (telephone, the mail) . . . cannot alone provide the 'minimum contacts' required by due process."). Furthermore, Adams and Pope state, and Layton does not contest, that Layton was in Georgia when the employment offer was made and when he was given a draft employment agreement.

Reviewing all available facts and circumstances, this court cannot conclude that Adams's and Pope's contacts with Missouri were such that they purposely availed themselves of the rights and privileges of Missouri, whereby they should reasonably have anticipated being haled into court in Missouri. See Digi-Tel Holdings, Inc. v. Proteq Telecomm., Ltd., 89 F.3d 519, 522 (8th Cir. 1996); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985).

Accordingly, the court does not have personal jurisdiction over defendants Adams and Pope.

E-Distributions and ITS

In support of personal jurisdiction, Layton argues that defendants solicited him in Missouri for employment, he executed the employment agreement in Missouri, the agreement was to be performed in Missouri, E-Distributions's intention was for him to solicit business in Missouri, and defendants have entered into contracts with Missouri businesses. (Doc. 11 at 1-7.)

In his declaration in support of defendants' motion to dismiss, Pope,³ as President of ITS, states that "ITS is a corporation organized

³The declaration of Adams is not discussed, as it does not differ from Pope's declaration in any material respect.

and existing under the laws of the State of Georgia, and has its sole office in the State of Georgia." Pope further states that ITS has never been registered to conduct business in Missouri, has no agent in Missouri for service of process, and owns no real property in Missouri. Moreover, Pope declares that he was the President of E-Distributions in October 1999, and E-Distributions was formerly dissolved as of August 16, 2004. Pope states that E-Distributions "has not been registered to do business in the State of Missouri; has not had any registered agent for the service of process in Missouri; and has not owned any real estate in the State of Missouri." (Doc. 6, Ex. A.)

Pope contends that ITS develops all products and technology at its offices in Georgia. Orders are placed when potential customers contact ITS. ITS ships and bills its products from Georgia. ITS has four clients for whom it occasionally ships materials to Missouri; those clients are located in Georgia and California. All shipments are F.O.B. ITS dock in Georgia. (Id. at 2.)

Pope states he met Layton in 1996, when Layton approached the then owner of ITS (Graphic Industries) about purchasing the company Layton worked for, D2000. Pope, Adams, and additional Graphic Industries' personnel met with Layton, in Georgia, regarding the potential sale and opportunities for Layton in the purchased company. The sale never took place. (Id.)

Pope states that in 1999 Layton approached ITS and met with Pope in Georgia regarding employment opportunities. Pope states that Layton went to Georgia on an additional occasion, and at that time he was offered employment and was presented with a draft copy of the employment agreement. Pope contends he made no trips to St. Louis to arrange or negotiate the employment agreement, and that negotiations for the agreement took place in Georgia, and possibly by telephone and/or facsimile. The agreement itself was drafted in Georgia, Pope executed the agreement in Georgia, the decision to terminate Layton was made in Georgia, by Adams and Pope, and the termination letter was drafted and mailed from Georgia. (Id.)

Pope further states that Layton commuted to Georgia during his employment with E-Distributions, and he was asked to change his

residence to Georgia. Moreover, Layton was not required to maintain his residence in Missouri to perform his job, and that doing so was his personal choice. While employed with E-Distributions, "Layton did not secure any business in Missouri." (Id.)

In his affidavit, Layton declares he was contacted by Adams in August of 1999 regarding possible employment with ITS. Layton then traveled to Georgia to discuss employment opportunities. At that time, he states that Adams and Pope told him "their intention was for him to conduct sales and client development from [his] location in St. Louis, Missouri, to a potential client base nationwide on behalf of [ITS]." Shortly thereafter, Layton was sent an employment agreement, which he executed and mailed to Adams. (Doc. 11, Ex. 1.)

Layton states he solicited customers by telephone and personal visits, on behalf of E-Distributions, in Missouri and nationwide. He further states that E-Distributions and ITS have contracted for services with Hardee's Corporation, which maintains its marketing headquarters in Missouri. During his employment, Layton states he maintained no offices outside Missouri, and he never agreed or intended to maintain an office anywhere outside of Missouri. Layton states that Pope and Adams specifically told him of their intention for him to work as an employee of E-Distributions and ITS from Missouri, and that it was their intention for Layton to solicit "business in general in St. Louis, Missouri by whatever means, including, but not limited to, telephone calls and personal visits to potential customers." (Id. at 2.)

The court first notes that defendants' assertion that this court cannot maintain personal jurisdiction over E-Distributions, because it is a dissolved business entity, is misguided. See 4A Charles Alan Wright & Arthur R. Miller, Federal. Practice and Procedure § 1069.1 (3d ed. 2002) ("The dissolution of a corporation . . . is ineffective to protect it against service of process in an action involving acts committed by that company prior to its dissolution."). It appears service was effected on Lawrence M. Gold, the registered agent for E-Distributions in Atlanta, Georgia. (Doc. 7.)

With respect to jurisdiction based on the commission of a tortious act in Missouri, the court adverts to its analysis above regarding Pope

and Adams. Layton has proffered no facts or circumstances sufficient to show the commission of a tort as a basis for personal jurisdiction.

The court similarly finds defendants did not transact business within Missouri. In their declarations, both Pope and Adams note the corporations occasionally ship materials F.O.B. the ITS dock to Missouri for four clients, based in Georgia or California. In response, Layton provides no information as to any additional extent to which defendants are involved in the shipment of materials to Missouri, and he does not dispute the fact that he secured no business in Missouri. Layton alleges that defendants conducted business in Missouri, and cites specifically to the Hardee's Corporation having its marketing headquarters in Missouri. Beyond this statement, Layton provides no evidence or facts to deduce to what extent defendants contacted or did business with the Missouri division of Hardee's corporation, and provides no evidence or inference that defendants' business with Hardee's, or any other isolated shipments to Missouri as directed by additional parties, gives rise to this cause of action. Scullin Steel, 676 F.2d at 311 (citing Aaron Ferer & Sons Co. v. Diversified Metals Corp., 564 F.2d 1211, 1215 (8th Cir. 1977) ("Once jurisdiction has been controverted or denied, (the plaintiff has) the burden of proving such facts.")); State ex rel. Metal Serv. Ctr. Of Ga., Inc. v. Gaertner, 677 S.W.2d 325, 327 (Mo. 1984) ("The [transacting of] business may consist of a single transaction, if that is the transaction sued upon.").

While Layton does not directly address or assert the making of a contract in Missouri as a basis for jurisdiction, the facts and circumstances surrounding this case warrant brief discussion of this issue. Layton alleges that the employment agreement was mailed to him in Missouri, and he executed the agreement in Missouri. Thus, Layton could argue that the final act creating his employment contract occurred upon his signature, in Missouri. However, precedent requires something more to satisfy due process. Carithers Stores, Inc. v. Fifty Assocs., 568 F.Supp. 307, 309 (E.D. Mo. 1983) (quoting Iowa Elec. Light & Power Co. v. Atlas Corp., 603 F.2d at 1303, n.3 ("In Iowa Elec. Light & Power Co. v. Atlas Corp., . . . the Eighth Circuit held that the mere entering into a contract with a forum resident does not provide the requisite

contacts to satisfy due process. The court held that "[t]o assess compliance with due process . . . the minimum contacts relied upon must be between the defendant and the forum state, not simply between the defendant and a resident of the forum state.'" (internal citations omitted).

The court concludes Layton has not established sufficient minimum contacts under the Due Process clause. In order to determine the sufficiency of any contacts, the court looks at "(1) the nature and quality of the defendant's contacts with the forum state; (2) the quantity of contacts; (3) the relationship between the cause of action and the contacts; (4) the forum state's interest in providing a forum for its residents; and (5) the convenience of the parties." Digi-Tel, 89 F.3d at 522- 23.

With respect to the nature, quality, and quantity of contacts, Layton alleges that it was the defendants' intent to have him work from Missouri and to solicit business in Missouri. Defendants contend, and Layton does not gainsay, that Layton's residence in Missouri was not a requirement under the employment contract, but his choice; that he was asked to relocate to Georgia; and that Layton's sales area was nationwide and not specifically targeted to Missouri. No proffered facts suggest that defendants intended that Layton work in Missouri to direct their activities at Missouri (beyond Missouri being his residence at the time of contract). See Principal Residential Mortgage, Inc. v. Mac-Clair Mortgage Corp., 336 F. Supp. 2d 922, 928 (S.D. Iowa 2004) (recognizing defendant must purposely avail itself of the privilege of conducting activities in the forum state for the purposes of minimum contacts jurisdiction); Lucachick v. NDS Ams., Inc., 169 F. Supp. 2d 1103, 1108 (D. Minn. 2001) ("[T]he contacts between NDS and Minnesota were neither purposeful nor meaningful. Lucachick's residence in state was voluntary."). The record indicates that Layton chose to live in the forum state, and such residence does not, of itself, provide a sufficient basis to support minimum contacts.

Moreover, no suggested facts indicate that defendants had any contacts with Missouri beyond an occasional F.O.B. shipment for clients residing outside Missouri, that defendants do business with Hardee's

Corporation, which has its marketing headquarters in the state, and that there were occasional telephone, facsimile, or mail communications during contract negotiation. These contacts are not sufficient to support due process. See Bell Paper Box, Inc. v. Trans W. Polymers, Inc., 53 F.3d 920, 923 (8th Cir. 1995); Scullin Steel, 676 F.2d at 314 ("The use of interstate facilities (telephone, the mail), the making of payments in the forum state, and the provision for delivery within the forum state are secondary or ancillary factors and cannot alone provide the "minimum contacts" required by due process.").

Layton points to language in a non-compete provision of the contract at issue, stating Layton's "territory" is "the area where Employee is responsible for performing Services for the Company"-- "Missouri and Georgia." (Doc. 11, Attach. Executive Employment Agreement, at 4 & Ex. B.) This contractual provision by itself is not a sufficiently substantial minimum contact. The record indicates that Layton had a nationwide territory and that he lived in Missouri while working for E-Distributions.

Defendants have never been registered to do business in Missouri, have no property in Missouri, have no registered agents in Missouri, have never traveled to Missouri for corporate business, and there is no real showing they had any other contacts with the State of Missouri. Layton's affidavit provides uncertain allegations, but no facts to suggest continued minimum contacts to establish jurisdiction. See Charles Schmitt & Co. v. Gran Prix Auto Wholesalers, Inc., 616 F. Supp. 1191, 1194 (E.D. Mo. 1985) (finding insufficient an affidavit failing to allege particular facts with respect to alleged contacts).

Similarly, the relationship between the asserted contacts and plaintiff's causes of action does not support a finding of personal jurisdiction. Defendants' asserted contacts with the Hardee's Corporation are unrelated to plaintiff's claims. Moreover, the contacts which established the contract between the parties, while related to plaintiff's claims, are not, as discussed previously, legally sufficient to establish jurisdiction.

Regarding Missouri's interest in the litigation and the convenience of the parties, there is no question Missouri has an interest in

resolving the disputes of its citizens. However, Georgia has an equal interest in resolving the disputes of its citizens. Moreover, the instant litigants are currently parties to a suit pending in the United States District Court for the Northern District of Georgia. The interest of the forum state and party convenience are secondary concerns. Scullin Steel, 676 F.2d at 313 n.4 ("The last two factors [interest of the forum state and convenience of the parties] are of secondary importance and not determinative."). This, coupled with pending litigation in Georgia and the equal convenience and interest of Georgia as a forum state, does not persuade this court that Missouri is the appropriate forum.

For these reasons, defendants' motion to dismiss is sustained. An appropriate order shall issue herewith.

A handwritten signature in black ink, reading "David D. Noce". The signature is written in a cursive style with a large, sweeping initial "D".

DAVID D. NOCE
UNITED STATES MAGISTRATE JUDGE

Signed this day, March 17, 2005.